STATE OF MAINE PUBLIC UTILITIES COMMISSION

Docket No. 2005-771

May 3, 2006

PUBLIC UTILITIES COMMISSION Public Interest Payphone Program (Chapter 252) ORDER ADOPTING RULE

ADAMS, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this rulemaking, we adopt Chapter 252, the Public Interest Payphone Program, which establishes a process for reviewing and approving requests for Public Interest Payphones (PIPs) as required by 35-A M.R.S.A. § 7104(6) and 35-A M.R.S.A. § 7508. The rule also provides procedures for the selection and compensation of PIP providers.

II. BACKGROUND

In 2005, the Maine Legislature enacted 35-A M.R.S.A. § 7508, requiring the Commission to establish by rule¹ "a process for reviewing and approving requests for public-interest pay phones." The statute also authorizes the Commission to require annual contributions, up to \$50,000, to a state universal service fund to provide the means of paying for public interest payphones. *Id.* at § 7104(6).

The statute sets forth two general criteria for the establishment of the public interest payphones:

- 1. A proposed public interest payphone must fulfill a public welfare, health or safety policy objective; and
- 2. A traditional payphone would not otherwise remain or be placed at a proposed public interest payphone location by the operation of the competitive marketplace.

35-A M.R.S.A. § 7508(1).

¹ The statute provides that the rule is a routine technical rule pursuant to Title 5, Chapter 375 subchapter 2-A.

² The Maine statute hyphenates "public interest" and makes "payphones" two words. Under Commission and Federal practice, "public interest" is not hyphenated and "payphone" is one word.

B. Commission Inquiry

On September 13, 2005, the Commission opened an inquiry (Docket No. 2005-519) to obtain comments to assist in the development of a PIP rule. The Commission sent notice of the inquiry to all parties in Docket No. 2003-420, which involved PIPs, and to other interested persons. Verizon Maine (Verizon), the Telephone Association of Maine (TAM), the Office of the Public Advocate (OPA), Maine Equal Justice Project, the Town of Durham, and Representative Herbert Adams filed written comments. The comments were helpful in developing the rule, although we did not receive responses to our request for information regarding the incremental cost to telephone utilities of implementing a PIP program.

C. Proposed Rule

On January 9, 2006, the Commission opened a rulemaking in this matter. We held a public hearing on February 9, 2006 and received written comments.³

III. DISCUSSION ON THE LEGALITY OF THE OVERALL PIP PROGRAM APPROACH

In the proposed rule, we attempted to set forth a proposed PIP program that would maximize the number of PIPs deployed statewide. We based our proposal on an examination of PIP programs in other states, an investigation into appropriate telephone equipment available in the market, knowledge we had obtained in the course of other Commission proceedings, and comments we received as part of our Inquiry.

In the proposed rule, we placed many of the implementation responsibilities on incumbent local exchange carriers (LECs), and proposed that the incumbent LECs be compensated at their incremental cost for all services provided to the PIP program. It was our intent that an incumbent LEC should be held revenue neutral for activities associated with the program, and that program costs should be minimized. TAM, Verizon, and the OPA voiced several objections to this approach.⁴ In particular,

³ Commenters include the Administrative Assistant of Weston, Andre Benoit, Christopher White of Cranberry Isles, Dan Hill, Eva Douglas of Cliff Island, the Director of Health & Welfare of Bangor, the Director of Health and Welfare of Augusta, the Maine Coalition Against Sexual Assault (MECASA), the Maine Equal Justice Project, the Maine Welfare Directors Association, the Office of the Public Advocate (OPA), Pine Tree Legal Assistance, Inc., Region II Homeless Council, Representative Herb Adams, Sarah Cooke of Cliff Island, the 2nd Selectperson of Washington, the Telephone Association of Maine (TAM), the Town Manager of Bucksport, the Town Manager of Vinalhaven, Verizon, and Womancare.

⁴ Briefly summarized, these commenters asserted that the PIP program, as set forth in the proposed rule, did not select PIP providers in a competitively neutral

concern was expressed that the proposed rule would violate Federal law and FCC regulations concerning the deregulation and detariffing of payphone service.

Without determining the merits of these objections, we believe that the public will be best served through the implementation of a program that will not become mired in legal challenges and that can, therefore, become operational as soon as possible. Accordingly, we have revised the implementation procedures in a way so that avoids those aspects of the program claimed to violate federal law. Specifically, we have revised the process by which PIPs will be purchased, installed, and maintained. These changes will not affect PIP users, they will result in easier procedures for PIP applicants, and they eliminate the objections based on Federal law and FCC regulations.

Under the terms of the final rule, regulated incumbent LECs will not be required to provide or install PIPs. Further, all LECs -- both incumbent and non-incumbent -- will be afforded the same benefits and assigned the same obligations. Specifically, LECs will be compensated at their tariffed rate for any service they provide pursuant to the PIP program. These changes remove the concerns expressed by Verizon, TAM, and the OPA. In fact, the approach taken by the amended rule is similar in many respects to that suggested by Verizon and TAM in their comments.

Under the terms of the final rule, LECs will be required to provide access lines in a manner and at a price consistent with their tariffs. A competitively selected "Pip provider" or providers will obtain, install, and maintain all PIPs and will pay each LEC its tariffed access line rate applicable to PIP service. The competitively selected PIP provider(s) will be compensated according to the terms of its bid and from the funds dedicated to the PIP program by statute.

manner, did not provide full and fair compensation to the PIP provider, and would be improperly subsidized by customers of the incumbent LECs' regulated services.

⁵ Subsection 4(C) of the final rule requires that the PIP Provider be chosen through the State's purchasing procedures. These procedures establish a competitive bid process for the procurement of service providers. Currently, the State's procedures also allow the procurement of a service provider through a sole source contract, in specified circumstances, for example, if we received no bids and could only obtain services from a sole source. We intend to use the State's competitive bidding process to obtain the PIP Provider, but the sole source procedure compensates for the risk that no bid is submitted.

⁶ Currently, the law allocates \$50,000 per year from the Maine Universal Service Fund. 35-A M.R.S.A. §7104(6).

IV. DISCUSSION OF GENERAL COMMENTS REGARDING THE BENEFITS OF PUBLIC INTEREST PHONES

We received numerous comments supporting the need for publicly available telephones. Many of these comments did not directly address the terms of the proposed rule, but rather cited situations in which a publicly available phone provided a significant safety, health or welfare benefit. Womancare, Augusta Health and Welfare, and MECASA cited victims fleeing abuse as persons who will use public phones as a means of obtaining crisis assistance. Representatives of Bangor, Augusta, Cliff Island, and Pine Tree Legal and a citizen commenter cited persons who need help obtaining transportation. Residents of Cliff Island commented that many homes there do not have telephones, making a public phone the only available phone for both "normal" and emergency calls. The town manager of Bucksport stated that his town has been unable to obtain coinless public telephones for the use of its residents. Vinalhaven and Cliff Island expressed the safety benefits of a phone near remote boat landings. A representative of Weston commented that the public regularly seeks use of the town office phone, and an official from Washington, Maine cited enhanced public safety in isolated towns. Pine Tree Legal discussed the large number of migrant farm workers who are without telephone service needed to call their families. Region II Homeless Council, Maine Welfare Directors Association, an official from the City of Augusta, and a citizen commenter noted that homeless, low-income, and mentally ill individuals and those needing acute medical care often cannot afford a telephone or locate a public payphone in order to obtain support or assistance. An official from the City of Augusta provided extensive information about the effectiveness of one of Augusta's inside public telephones.

These commenters generally did not address the processes by which phones would be purchased, installed, and maintained, or the means for providing and paying for access lines. We believe that these mechanical, financial, and legal matters are of little interest to those representing PIP users, provided that they do not prevent making PIPs readily available. These general comments were, however, helpful in assessing the needs that the PIP program must address.

V. DISCUSSION OF AMENDMENTS ADOPTED IN THE FINAL RULE

We discuss below each amendment to the proposed rule that we adopt. As the final rule has been reorganized for clarity, the subsection numbers may differ from the comparable subsection numbers in the proposed rule. We discuss comments under each section.

A. Rule Number

The proposed rule was inadvertently numbered Chapter 352, placing it within the numbers reserved for electric rules. Obviously this would result in confusion if not corrected. The final rule is numbered Chapter 252, placing it within the numbers reserved for telecommunications rules.

B. <u>Type of Telephone</u>

We have not amended the basic instrument requirements in Subsection 3(A)(1) and 3(A)(2), because they describe phones that are durable.

C. Color and Signs

Rep. Herb Adams commented that all PIPs should be a distinctive color and have uniform signs that will allow members of the public to easily recognize a PIP. We agree and have included this requirement in the final rule, in subsections 3(A)(1) and 3(A)(2).

The proposed rule required that a sign be placed near each PIP indicating that free calls should be limited to five minutes if another person were waiting. Because eliminating toll calling that is free to the PIP user removes one factor that could result in unusually long telephone calls, and because the effectiveness of such a sign was called into question by some commenters, there is less need for this provision and we have removed it from the final rule.

D. Coinless PIPs

In subsection 3(A)(3), we continue to require PIPs to be coinless. Since coinless PIPs cost substantially less than PIPs with a coin collection mechanism, we expect that more PIPs would be funded with the \$50,000 allocated by law if the PIPs are coinless. While the cost advantage alone warrants coinless phones, a number of commenters suggested situations in which a PIP user may not have coins available. In these situations, a coinless phone will provide a more valuable public service than a phone that requires coins.

⁷ Coin phones are more costly because of the higher cost of the phone itself and because of the cost in time and materials of collecting the coins. This latter cost will be even greater for PIPs located in remote rural areas.

⁸ Rep Herb Adams commented that exact change should not be required in emergencies, Womancare cited victims who are fleeing abuse may have no coins available, and Region II Homeless Council cited homeless individuals as likely to be without coins. A representative of Vinalhaven commented that full coin boxes in a Vinalhaven phone often renders the phone unusable.

E. Local and Emergency Calls

In subsection 3(B)(2), we continue to require that local calls (within the Basic Service Calling Area) be free to PIP users. While it is difficult to separate commenters' opinions regarding coinless phones, free local calling, and general availability, virtually all commenters who represented PIP users appeared to support free local calling. Rep. Herb Adams indicated that the opinions of his colleagues in the Legislature vary regarding the extent of calls that should be free, but that some legislators with whom he has communicated tend to believe that making local calls free would not be unreasonable. All commenters addressing the issue supported allowing free 800-style emergency calls.

Furthermore, because the PIPs will be coinless, requiring that users pay for local calls would require one of the commonly used calling cards or collect calls. This would make the PIP unusable for many whom the PIP is intended to help.

In response to comments by TAM and Verizon that PIP calls should not be free, we note that, although local calls placed from a PIP will appear "free" from the perspective of PIP users, the LEC that carries the call will be compensated according to its tariffed rate from the state universal service fund as authorized by the statute.

Rep. Herb Adams and Pine Tree Legal also commented that, at the request of the applicant, PIPs should be made incapable of receiving incoming calls. These features have been retained in the final rule in subsection 3(B)(3).

F. Instate Toll Calls

In the final rule, we have modified the PIP free calling area so as not to include free calling to the entire state.

In their comments, Verizon, TAM, and some other commenters argued that statewide free calling was neither lawful nor desirable. Rep. Herb Adams, who asserted that none of the legislators on the committee that recommended approval of the legislation intended that PIPs provide free calls to all Maine locations, recommended that the Commission revise this provision of the rule. While representatives of PIP users supported coinless and free calling for emergency and support services purposes, most did not explicitly express a need for statewide toll-free calling.⁹

⁹ Pine Tree Legal noted that, while free instate calls would be beneficial for migrant farm workers, the greater need is to provide a means by which such workers can place out-of-state calls to their families through the use of prepaid calling cards. Maine Welfare Directors Association and the Augusta Director of Health and Welfare considered free local calling to be sufficient to address health, safety and welfare needs. Others noted that many crisis and emergency numbers are toll-free.

In light of concerns expressed by commenters, the minimal need for statewide free calling among PIP users, and our concern with the cost of providing toll service at no cost to the user (i.e., funding the toll calls through the limited public funds), we have removed this free service from subsection 3(B)(2) in the final rule, which has the added benefit of eliminating the legal objection. We note that PIP users may still make instate toll calls using collect calling or one of the standard cards available for this purpose.

G. Providing and Installing the PIPs

As discussed earlier in this Order, Verizon and TAM objected that the proposed rule's requirement that incumbent LECs (and only incumbent LECs) provide PIPs was not lawful under federal law and FCC regulations. As discussed earlier in this Order, in subsection 4(A)(1), we have replaced this requirement with an approach in which open market bidders would provide and install the PIPs.¹⁰ The provisions in the proposed rule regarding the price that the fund compensates the entity purchasing or installing the phone are no longer relevant and have been removed in the final rule. A PIP provider will be compensated for its costs under the pricing arrangement established through the competitive bidding process.

H. Maintaining the PIPs

The proposed rule required that the PIP applicant maintain the phone that it receives. Commenters provided us no clear guidance regarding the technical ability or the inclination of PIP applicants to undertake this responsibility. Rep. Herb Adams commented that maintenance should be paid for from the allocated program funds.

Consistent with the overall approach to the PIP program that we adopt in the final rule, subsection 4(B)(1) requires a PIP provider to carry out routine maintenance and repair on the PIPs. Thus, the PIP applicant will have no responsibilities in this regard. Maintenance of PIPs will be the contractual responsibility of the PIP provider, whose successful competitive bid will presumably be based, in part, on this obligation.

I. Access Lines

Consistent with the overall approach to the PIP program that we adopt in the final rule, subsection 4(B)(2) requires a PIP provider to arrange with a LEC for the installation of an access line that will carry the calls made from the PIP. Subsection 4(A)(1) requires that the LEC carrying the PIP calls provide an access line, a requirement that places no new responsibility on a LEC.

¹⁰ An incumbent LEC may, at its option, bid to become the PIP provider.

J. PAL Rate

The proposed rule specified that the incumbent LEC carrying the PIP call would be compensated for its out-of-pocket costs. In our Notice of Rulemaking, we noted that the incremental cost of these calls would likely be de minimis. TAM and Verizon commented that such an approach to compensation is inequitable and would violate federal law and FCC regulations prohibiting the subsidization of PIP costs by other ratepayers. In the view of TAM and Verizon, compensation for PIP calls must be made at the appropriate tariffed rate.

Without determining the merits of TAM's and Verizon's objections, we adopt, in subsection 4(B)(2) of the final rule, a compensation mechanism which provides that the LEC that carries the calls made from a particular PIP will be compensated for each local call using a tariffed Public Access Line rate (PAL rate). A LEC can use an existing flat PAL rate or may file a PIP PAL rate. PAL calls are subject to federally mandated requirements, such as compensation for interstate calls, which will be applicable to the calls made under the PIP program established by this rule.

In light of the need for certainty regarding the costs of administering the new PIP program, subsection 4(A)(1) of the final rule requires that all tariffed PAL rates be expressed as a fixed per-month rate without any usage or per-call charges. This is necessary because PIP users are not required to pay a usage-sensitive rate for a local call. Without such a price signal there will be no constraint on the length of calls made from PIPs, and, with no such constraint, a usage-sensitive PAL rate could result in unpredictably high bills. This could quickly deplete the PIP compensation fund or provide a high level of risk for PIP providers operating under fixed compensation amounts determined by their bids.

J. <u>Application Form and Time Frame</u>

We received no suggestions to materially change the application form. Consistent with the approach in the final rule, subsection 5(A) has been revised to remove a reference to maintaining the PIP.

In subsection 5(B) of the final rule, we retain the annual application period as the most efficient means of implementing the program and allocating available funds. Nonetheless, subsection 5(D) of the final rule permits PIP applications to be made at any time outside the annual application period, thereby allowing applicants to apply when a new need for a PIP arises. The Commission will approve such additional applications to the extent that funds are available.¹²

¹¹ Many incumbent LECs currently have a tariffed PAL rate priced at 125% of the flat business rate. We will judge each filed PAL rate on its own merits.

¹² In his comments, Rep. Herb Adams supported an annual application period, but asserted that adding a flexible, responsive way to deal with emergency applications

K. PIP Selection

The proposed rule identified seven criteria that the Commission would consider when approving and ranking PIP requests. It also identified 14 types of locations that the Commission would deem to have high ranking. Pine Tree Legal, Rep. Herb Adams, and others advocated more flexibility in considering applications. These commenters also gave examples of specific needy locations that would fall through the cracks if the selection criteria remained as rigid as originally proposed. Further, several commenters cited the importance of providing PIPs in rural areas underserved by cellular or landline phones.

These comments objected primarily to the 14 location types that, under the proposed rule, receive a presumptively high ranking. On the other hand, the comments supported the flexibility offered by the criteria that we proposed to use in ranking applications. For example, commenters referred to the following criteria as desirable: inability of an applicant to fund its own PIP; the lack of a phone because of locational remoteness; nonexistent cell phone coverage; the predominance of low-income, elderly, or homeless people lacking their own phones; average income in the area generally; the lack of landline phones on islands; proximity of a commercial establishment to individuals in need; and the unwillingness of employers to provide landline phone service. Overall, these commenters pointed to health, safety, and welfare as being the overarching reasons for installing a PIP. The comments did not convince us to add any additional criteria to the final rule. They did, however, provide evidence that there is support for using a broad range of considerations when approving PIP locations.

We have eliminated the priority locations from the final rule. However, we have retained the criteria in subsection 6(A) because they are consistent with the criteria discussed by those who represent PIP users. This will allow us to rank each applicant by the criteria in subsection 6(A). On balance, this approach is preferable in the early years of the PIP program. As we learn more about the entities that apply for PIPs and the use that is made of them, we may consider introducing more objectivity into the selection criteria if, and when, it would be helpful to do so.

L. Proximity of PIPs to Other Publicly Available Phones

In their comments, Verizon and TAM suggested that there is no need for a PIP where a non-PIP public phone is located nearby. Both pointed to the New Hampshire PIP program, which requires that no PIP be authorized at a location within 750 feet of a public payphone.

and to allow applicants to determine when they would apply would improve the approach. The final rule is more flexible than the proposed rule in this regard.

¹³ TAM objected to the subjective nature of the criteria in general, and also to the merits of specific criteria.

We agree that placing public phones in close proximity to one another would be an inefficient and inappropriate use of the funds that have been made available for the PIP program. While the proposed rule addressed this concern in the ranking criteria section of the rule, the final rule establishes procedures that are more explicit. We have removed proximity from the ranking criteria and added subsection 6(B) to the final rule, which specifies that a PIP will not be approved if another publicly available phone is located within 1000 feet.

In addition, subsection 5(G) states that the Commission will publish on its web page the approved PIP sites and that, if a payphone provider informs us within 20 days of the posting that it has installed a publicly available phone (which may be a payphone that requires coins) within 1000 feet of an approved site, we will not place a PIP in that location. This provision will ensure compliance with the explicit requirement of the statute that "a payphone would not otherwise remain or be placed by the operation of the competitive marketplace." 35-A M.R.S.A. §7508(1).

In response to Pine Tree Legal's concern that one payphone may be inadequate to meet the needs of certain locations (such as farm worker camps where many users require access to a public phone at the same time), subsection 6(B) of the final rule allows a PIP to be installed in close proximity to another publicly available phone if the applicant makes a showing that it is necessary to advance the public health, safety, or welfare goals of the program.

Accordingly we

ORDER

- 1. That the attached rule, Chapter 252 Public Interest Payphone Program, is hereby adopted;
- 2. That the Administrative Director shall file the provisionally adopted rule and related materials with the Secretary of State; and
 - 3. That the Administrative Director shall notify the following of this Order:
 - a. All persons who commented in this rulemaking; and
- b. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking.

Dated at Augusta, Maine, this 3rd day of May, 2006.

BY ORDER OF THE COMMISSION

Dennis L. Keschl Acting Administrative Director

COMMISSIONERS VOTING FOR: Adams

Diamond Reishus